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AmBank Islamic Bhd v Seacera Group Bhd

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-487–07 OF 2019
KHADIJAH IDRIS J
24 JANUARY 2020

C *Civil Procedure — Summary judgement — Application for — First defendants obtained various financing facilities from the plaintiff — Facilities were guaranteed against the second defendant — First defendants defaulted on payments — Whether letter of offer, facility agreement and guarantee and indemnity were void — Whether letter of offer, facility agreement and guarantee*
D *and indemnity complied with shariah principles — Whether plaintiff entitled to claim outstanding sum as the basis and/or method for computation of the outstanding asset sale prices and late compensation*

E This is the plaintiff's application for summary judgement against the defendants in respect of the various financing facilities to the first defendant which was guaranteed against the second defendant. According to the plaintiff, pursuant to the letter of offer dated 6 June 2016 and a facility agreement dated 6 January 2017 the plaintiff granted to the first defendant the following facilities: (a) Murabahah Tawarrup Term Financing-I ('TF-I Facility') not
F exceeding the limit of RM5m with the maturity date of 1 February 2037; and (b) Cashline-i under the shariah principle of Bai'Inah (Cashline-i facility) not exceeding the limit of RM5m with the maturity date of 19 January 2020. The two facilities are collectively referred to as the 'facilities'. In consideration of the facilities, the following securities were executed: (i) a legal charge over a land in
G George Town, Pulau Pinang, dated 6 January 2019 executed in favour of the plaintiff; and (ii) a guarantee and indemnity agreement dated 6 January 2017 in favour of the plaintiff's facilities on the due dates. Through its letters dated 19 June 2019, the plaintiff, through its solicitors, issued letters dated 15 May 2019 and 21 May 2019 to the first defendant declared, inter alia, that an event
H of default has occurred, the facilities were cancelled and all monies under the facilities were immediately due and payable and demanding payment of all sums due under the facilities.The first defendant however failed, neglected and/or refused to settle the outstanding sums due to the plaintiff with late payment charges. The plaintiff had not realised the security for the facilities. It
I is the plaintiff's case that as of 8 May 2019 the defendant was indebted to the plaintiff for TF-i facility for RM12,364,364.10 and Cashline-I for Facility RM5,942,359.07. The defendant contended: (1) the letter of offer, facility agreement and the guarantee and indemnity had not complied with shariah principles in relation to the witnesses and was void for ambiguity (*gharar*)

and/or violated s 30 of the Contracts Act 1950; (2) in respect of the facilities that there were no sale and purchase agreement executed between the plaintiff and the first defendant and they were not complaint with the guidelines issued by Bank Negara Malaysia; and (3) the plaintiff was not entitled to claim the outstanding sum as the basis and/or method for computation of the outstanding asset sale prices and the late compensation was not explained in detail and was not contained in any of the plaintiff's documents.

Held, allowing the plaintiff's application for summary judgement and costs of RM4,000:

(1) The plaintiff had fulfilled the preliminary requirements and thus established a prima facie case. The burden shifted on the defendants to prove that there were issues or questions in dispute which ought to have been tried or there ought for some reason to be a trial, namely, there were circumstances that ought to be investigated by the court (see paras 20–21)

(2) In so far as the applicable law for Islamic banking facility was concerned, the law governing conventional banking was still applicable to it. There was no legal requirement for the letter of offer, facility agreement and guarantee and indemnity must be witnessed by two male witnesses or a male witness and two female witnesses. The requirements for the witnesses was also not in the Shariah Standard and Operational Requirements issued by Bank Negara Malaysia. Therefore, the contention with regards to the execution of it was not tenable and unfounded (see para 23).

(3) Since the underlying assets were specifically identified in the various documents related to the facilities and the same were shariah complaint, there was no issue of uncertainty as to the underlying asset. Under the circumstances the defendants' allegations that the letter of offer, the facility agreement and the guarantee and indemnity were void due to a mutual mistake as to the underlying assets was patently flawed and untennable (see para 31).

(4) The first defendant did not deny they have accepted the letter of offer and executed the facility agreement. Thus, they were bound by the terms of the letter of offer and the facility agreement in particular the terms on the method of computation of the ta'widh and the outstanding asset sale price (see para 34).

[Bahasa Malaysia summary

Ini merupakan permohonan plaintiff untuk penghakiman terus terhadap defendan berkaitan dengan beberapa kemudahan pembiyaan kepada defendan pertama yang dijamin oleh defendan kedua. Menurut plaintif, selaras dengan surat tawaran bertarikh 6 Januari 2017, plaintif telah memberikan kepada

defendan pertama kepada kemudahan berikut: (a) Murabahah Tawarrup Term Financing-I ('TF-I Facility') tak melebihi had RM5 juta dengan tarikh matang pada 1 Februari 2037; dan (b) Cashine-i dibawah prinsip syariah Bai'Inah (Cashline-i facility) tidak melebihi had RM5 juta dengan tarikh matang pada 19 Januari 2020. Dua kemudahan ini secara kolektif dirujuk sebagai kemudahan-kemudahan tersebut. Sebagai balasan kepada kemudahan-kemudahan tersebut, cagaran berikut telah dilaksanakan: (i) satu gadaian terhadap satu tanah di George Town, Pulau Pinang bertarikh 6 Januari 2019 yang dilaksanakan yang memihak kepada plaintif; dan (ii) satu perjanjian cagaran dan tanggung rugi bertarikh 6 Januari 2017 yang memihak kepada kemudahan-kemudahan plaintif pada tarikh luput. Melalui surat mereka bertarikh 19 Jun 2019, plaintif melalui peguammya, telah mengeluarkan surat bertarikh 15 Mei 2019 dan 21 Mei 2019 kepada defendan pertama dan mengisytiharkan, antaranya, dalam satu keadaan keingkaran telah berlaku, kemudahan tersebut telah dibatalkan dan semua wang dibawah kemudahan tersebut adalah terjumlah dan perlu dibayar dan menuntut pembayaran semua wang terhutang dibawah kemudahan-kemudahan tersebut. Defendan pertama gagal, abai dan/atau enggan untuk menyelesaikan semua jumlah terhutang kepada plaintif dengan caj pembayaran lewat. Plaintif tidak melunaskan cagaran kepada kemudahan-kemudahan tersebut. Adalah menjadi kes plaintif bahawa setakat 8 Mei 2019, defendan terhutang kepada plaintif untuk TF-i facility sejumlah RM12,364,364.10 dan Cashline-i facility untuk jumlah RM5,942,359.07. defendan menegaskan bahwa: (1) surat tawaran, perjanjian kemudahan dan perjanjian cagaran dan tanggung rugi tidak mematuhi prinsip syariah berkaitan dengan saksi dan adalah terbatal atas sebab kekaburan (*gharar*) dan/atau melanggar s 30 Akta Kontrak 1950; (2) berkaitan dengan kemudahan yang mana tiada perjanjian jual beli dilaksanakan diantara plaintif dan defendan pertama dan ianya tidak mematuhi garis panduan yang dikeluarkan oleh Bank Negara Malaysia; dan (3) plaintif tidak berhak untuk menuntut jumlah terhutang kepada asas dan/atau cara pengiraan harga jualan aset terhutang dan ganti rugi lewat yang tidak diterangkan secara terperinci dan tidak terkandung dalam mana-mana dokumen plaintif.

Diputuskan, membenarkan permohonan plaintif untuk penghakiman terus dan kos RM4,000:

(1) Plaintif telah memenuhi semua keperluan awal dan oleh itu membuktikan kes prima facie. Beban kemudian berpindah kepada defendan untuk membuktikan bahawa wujud isu atau soalan yang dipertikaikan yang perlu atau harus dibicarakanatau untuk apa-apa sebab perlu ada satu perbicaraan, iaitu wujudnya keadaan yang harus disiasat oleh mahkamah (lihat perenggan 20–21).

(2) Setakat mana undang-undang yang terpakai untuk perbankan islam, undang-undang yang menguasai perbankan konvensional masih terpakai. Tiada keperluan undang-undang untuk surat tawaran,

perjanjian kemudahan dan cagaran dan tanggung rugi perlu disaksikan oleh seorang saksi lelaki atau dua saksi perempuan. Keperluan untuk saksi juga tidak dalam keperluan piawaian dan operasi yang dikeluarkan oleh Bank Negara Malaysia. Oleh itu, hujahan berkaitan degan pelaksanaannya tidak berasas (lihat perenggan 23).

(3) Memandangkan aset pendasar adalah dengan khususnya dikenalpasti dalam beberapa dokumen berkaitan dengan kemudahan yang sama adalah mematuhi prinsip-prinsip syariah, tiada isu kekabuaran berkaitan dengan aset pendasar. Dibawah keadaan yang mana pengataan surat tawaran, perjanjian kemudahan dan cagaran dan tanggung rugi adalah terbatal kerana satu kesilapan kedua-dua pihak berkaitan dengan aset pendasar adalah cacat dan tidak boleh diterima (lihat perenggan 31).

(4) Defendan pertama tidak menafikan bahawa mereka telah menerima surat tawaran dan melaksanakan perjanjian kemudahan. Oleh itu, mereka terikat dengan terma surat tawaran dan perjanjian kemudahan secara khususnya dalam terma dan cara pengiraan ta'widh dan harga jualan aset belum dijelaskan (lihat perenggan 34).]

Cases referred to

Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors [2017] 2 MLJ 686, CA (refd)

Bank Muamalat Malaysia Bhd lwn Kong Sun Enterprise Sdn Bhd & Yang Lain [2012] 10 MLJ 665, HC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, HC (refd)

Chong Hin Trading Co Sdn Bhd & Ors vs Malayan Banking Berhad [2004] 4 MLJ 453; [2004] 4 CLJ 436, CA (refd)

Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69, CA (refd)

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2011] 3 MLJ 766; [2010] 4 CLJ 388, HC (refd)

Tengku Azman bin Tengku Adnan & Anor v Hong Leong Bank Bhd [2015] 2 MLJ 139, CA (refd)

United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657; [1999] 2 CLJ 151, FC (refd)

Legislation referred to

Contracts Act 1950 s 21

Rules of Court 2012 O 14 rr 1, 2, 3, 4

Ng Hooi Huang (Cheah Faan Jin with him) (Shook Lin & Bok) for the plaintiff.
Raja Nurul Iylia Raja Mohd Tajuddin (Intan Sharina Ahmad Sharizal with her) (Edlin Ghazaly & Assoc) for the defendant.

Khadijah Idris J:

INTRODUCTION

[1] Enclosure 8 is the plaintiff's application for summary judgment against the defendant in respect of the various Islamic financing facilities granted to the defendant by the plaintiff.

[2] The plaintiff's application was allowed and the defendant appealed.

THE PLAINTIFF'S PLEADED CASE

[3] Via letter of offer dated 23 May 2017 ('letter of offer') and facilities agreement dated 9 June 2017 ('facilities agreement') the plaintiff granted to the defendant the following facilities:

(a) Murabahah Tawarruq Term Financing-i ('TF-i Facility') not exceeding the limit of RM1.26m;

(b) Murabahah Tawarruq Cashline-i ('Cashline-i Facility') not exceeding the limit of RM5m; and

(c) Multi Trade Finance Facilities-i ('MTF-i Facilities') which includes, among others, Accepted Bills-i ('BA-i Facility') not exceeding the limit of RM5m.

[4] In so far as the MTF-i Facilities is concerned, the defendant had only utilised the BA-i Facility under the Shariah principle of Murabahah.

[5] The plaintiff is claiming the outstanding sums (inclusive of the asset sale price as described in the agreements) under the TF-i Facility with the maturity date of 1 July 2027, Cashline-i Facility with the maturity date of 23 May 2020 and BA-i Facility with maturity dates as specified in the respective Accepted Bill-i upon issuance. The TF-i Facility, Cashline-i, Facility and the BA-i Facility are collectively referred to as 'facilities'.

[6] The facilities are secured by a third-party legal charge registered on 20 June 2017 executed by one Seacera Ceramics Sdn Bhd in favour of the plaintiff over land held under GM 293193, Lot 6240, Bandar Subang Jaya, Negeri Selangor.

[7] The salient terms of the facilities agreement are as follows:

(a) cl 13 of the facilities agreement:

> In the event of default under the facilities, all monies due and payable by the defendant under the facilities shall become so due and payable and the defendant shall, on demand, pay all monies due to the plaintiff under the facilities

(b) cl 15 of the letter of offer and cl 6.3 of the facilities agreement:

> the defendant shall pay the plaintiff late payment charges (Ta'widh) in the following manner:
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> Prior to maturity date/expiry of the tenure of the Facility
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> (i) at the rate of 1% per annum calculated daily on the overdue instalments or upon cancellation, total outstanding balance on a non-compounded basis until date of judgment or until maturity of the financing of the Facilities, whichever is earlier. Thereafter, the defendant shall pay the plaintiff late payment charges (Ta'widh) at the prevailing Islamic Interbank Money Market rate to be calculated daily on the said outstanding balance on a non-compounded basis until the full settlement thereof;
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> After maturity date/expiry of the tenure of the Facility
>
> (ii) at the prevailing Islamic Interbank Money Market rate to be calculated daily on the outstanding balance on a non-compounded basis until the full settlement thereof.

(c) cl 14 of the letter of offer:

> That the plaintiff will grant Ibra' (rebate), if any, on such amount of the asset sale price remaining unpaid in accordance to the agreements. Ibra' (rebate) will be calculated based on the following formula or any other calculation method or formula as may be prescribed by Bank Negara Malaysia:
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> 'Rebate (ibra') = deferred profit – early settlement charge;

(d) cl 14.1 of the facilities agreement:

> The defendant shall fully indemnify the plaintiff for all costs and expenses which the plaintiff may incur as a consequence of the occurrence of any event of default under the agreements;

(e) cl 18.1(a) (i) of the facilities agreement:

> Any statement by the plaintiff as to the indebtedness of the defendant under the facilities shall be binding and conclusive against the defendant.

[8] The defendant had defaulted in making payments under the facilities on the due dates. Via letters dated 19 June 2019, the plaintiff through its solicitors has declared, inter alia, that an event of default has occurred, the facilities are cancelled and all monies under the facilities are immediately due and payable.

The plaintiff also demanded payment of all sums due under the facilities.

[9] The defendant had failed, neglected and/or refused to settle the outstanding sums due to the plaintiff with late payment charges thereon or any part thereof.

[10] The plaintiff has not realised the security for the facilities.

[11] It is the plaintiff's case that as at 8 May 2019, the defendant is indebted to the plaintiff as follows:

(a) TF-i Facility:

	TOTAL(RM)
Outstanding asset sale price	1,877,523
Ta'widh as at 8 May 2019	2.68
Total outstanding sum (as at 8 May 2019)	1,877,525.68

(b) Cashline-i Facility:

	TOTAL(RM)
Outstanding asset sale price	6,141,403.05
Ta'widh as at 8 May 2019	7.09
Total outstanding sum (as at 8 May 2019)	6,141,410.14

(c) BA-i under the MTF-i

NO	BILL REF	PRINCIPAL AMOUNT (RM)	ASSET SALE PRICE (RM)	TA'WIDH (RM)	OVERDUE HANDLING CHARGES (RM)	TOTAL OUTSTANDING SUM (RM)	DUE DATE
1	T80719FBA2080221	250,000.00	253,451.23	285.82	50.00	253,787.05	26/4/2019
2	T80719FBA2080303	251,000.00	254,625.20	132.45	50.00	254,807.65	3/5/2019
3	T80719FBA2080642	245,000.00	248,508.80	21.55	50.00	248,580.35	8/5/2019
4	T80719FBA2080950	396,000.00	401,719.43	-	-	401,719.43	15/5/2019
5	T80719FBA2081428	395,000.00	400,704.99	-	-	400,704.99	23/5/2019
6	T80719FBA2081656	252,000.00	255,670.22	-	-	255,670.22	28/5/2019
7	T80719FBA2082327	245,000.00	248,382.21	-	-	248,382.21	7/6/2019
8	T80719FBA2082441	271,300.00	275,218.39	-	-	275,218.39	13/6/2019
9	T80719FBA2083237	257,000.00	260,547.87	-	-	260,547.87	21/6/2019
10	T80719FBA2084063	300,000.00	304,250.47	-	-	304,250.47	9/7/2019
11	T80719FBA2084119	344,000.00	348,968.40	-	-	348,968.40	12/7/2019
12	T80719FBA2084436	398,000.00	403,700.01	-	-	403,700.01	18/7/2019
13	T80719FBA2084809	211,000.00	214,047.48	-	-	214,047.48	26/7/2019
14	T80719FBA2085471	300,000.00	304,214.14	-	-	304,214.14	2/8/2019
15	T80719FBA2085573	500,000.00	507,282.19	-	-	507,282.19	8/8/2019
16	T80719FBA2085727	205,000.00	207,960.82	-	-	207,960.82	9/8/2019
			4,889,251.85	**439.82**	**150.00**	**4,889,841.67**	
Total outstanding sum as at 8.5.2019						**4,889,841.67**	

THE DEFENDANT'S PLEADED DEFENCE

[12] It is argued by the defendant that:

(a) the letter of offer, the facilities and the facilities agreement are void because the execution of the said documents are non-Shariah compliant as the execution of the same were not witnessed by two male witnesses or a male witness and two female witnesses pursuant to Verse 282 of the Quran (Surah Al-Baqarah) ('Verse 282');

(b) the letter of offer and the facilities agreement are void for ambiguity ('gharar') and/or violates s 30 of the Contracts Act 1950 for not specifying the underlying assets which form the basis of the asset sale price and asset purchase price. As the underlying assets were not specified, there was mutual mistake under s 21 of the Contracts Act 1950 between plaintiff and defendant in respect of the identity, nature and description of the said assets;

(c) in respect of the TF-i Facility, Cashline-i Facility and MTF-i Facilities there were no sale and purchase agreement executed between the plaintiff and defendant. As such there is no basis to justify the asset sale price and the asset purchase price which is against Shariah principles;

(d) the plaintiff is not entitled to claim the outstanding sum as the basis and/or method of computation of the outstanding asset sale prices and the late compensation (Ta'widh) were not explained in detail and it is not contained in any of the plaintiff documents; and

(e) in respect of the BA-i Facilities, the profit rate was not provided for in the letter of offer and facilities agreement. The bills stated at no 4–14 in para 11(c) of the plaintiff's statement of claim has yet to mature as at 8 May 2019.

THE LAW

[13] Pursuant to O 14 rr 1 and 2 of the Rules of Court 2012 ('the RoC 2012'), in an application for summary judgment, it is incumbent on an applicant seeking the same to prove the following:

(a) the statement of claim has been served on the defendant;

(b) the defendant has entered appearance; and

(c) the applicant has affirmed an affidavit verifying the facts on which the statement of claim is based. The applicant is also required to affirm his belief that the defendant has no defence to the statement of claim.

[14] Upon the fulfilment of the above preliminary requirements the burden

is on the defendant to prove under O 14 rr 3 and 4 of the Rules of Court 2012 that there is an issue or question in dispute which ought to be tried (*National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544). An application for summary judgement may also be dismissed by the court if the defendant satisfies the court that there ought for some other reason to be a trial namely there are circumstances that ought to be investigated by the court (*United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151).

[15] As what amount to triable issue, the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653 held:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court ...
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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

FINDINGS OF THE COURT

Preliminary requirements

[16] There is no dispute that the plaintiff's statement of claim was served on the defendant. The defendant had entered their appearance vide memorandum of appearance dated 26 July 2019 (see encl 5).

[17] In their affidavit in support (encl 9) of the summary judgment application, the plaintiff has set out adequate facts including the salient terms upon which the facilities was granted in particular the TF-i Facility, Cashline-i

Facility and MTF-i Facilities. The relevant contemporaneous documents in relation to the facilities including the letter of offer and the facilities agreement are produced as exh AIB1 to encl 9.

[18] The plaintiff has also deposed that the defendant are justly and truly indebted to the plaintiff in the sums claim as particularised in paras 4 and 14 of the plaintiff's affidavit encl 9 and that the said sums is still due and owing. It is further averred by the plaintiff the defendant has no defence to their claim. The plaintiff's statement verifying the indebtedness due under the facilities is produced as exh AIB3 of encl 9.

[19] Base on the aforesaid, this court finds the plaintiff has fulfilled the preliminary requirements. Thus the plaintiff has established a prima facie case in respect of its claim against the defendant.

[20] The burden therefore shifts on all the defendants to prove that there are issue or question in dispute which ought to be tried or there ought for some other reason to be a trial, namely, there are circumstances that ought to be investigated by the court.

Purported triable issues raised by the defendant

[21] As to the execution of the letter of offer and the facilities agreement which were not witnessed by two male witness or a male witness and two female witnesses, reference is made to the case *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69 where the Court of Appeal held that:

> [28] ... We are mindful that, in the earlier case on Islamic banking, *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 2 AMR 177 the legal position was clearly stated by Abdul Hamid Mohamad JCA that even though the facility was an Islamic banking facility, it does not mean that the applicable laws are not the same laws. In this regard the real issue confronting the court was whether a contract which did not comply with Shariah on one hand, but in compliance with the law of contracts on the other hand, would be legally enforceable ...
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> ...
>
> [30] ... We are therefore of the view firstly, the provisions of the Contracts Act 1950 still govern Islamic contracts. It follows therefore the MOD facility agreements are not one that can be avoided under s 24 of the Contracts Act nor an illegal contract under s 25 and therefore remains an enforceable agreement and must be adhered to.

[22] Thus in so far as the applicable law for Islamic banking facility is concerned, the law is still the same as the law governing conventional banking. As pointed out by the plaintiff, there is no legal requirement for the letter of offer and the facilities agreement to be witnessed by two male witness or a male

witness and two female witnesses. In fact in the Shariah Standards and Operational Requirements on Murabahah issued by Bank Negara Malaysia on 23 December 2013 and the Shariah Standards And Operational Requirements on Tawarruq issued on 10 June 2016 and 28 December 2018, there is no requirement for the execution of the sale and purchase contract to be witnessed in the manner contended by the defendant. Thus the said issue is not tenable and unfounded.

[23] With regards to the issue of the underlying assets, perusal of the facilities agreement reveals the following:

TF-i Facility

(a) as provided in the Shariah Standards And Operational Requirements on Tawarruq issued by Bank Negara Malaysia on 28 December 2018 ('BNM-Tawarruq 2018') tawarruq involves two sets of separate and independent sale and purchase contracts in relation to an assest. The first set involves the sale of an asset by a seller to a purchaser on a deferred basis. Subsequently, the purchaser of the first sale will sell the same asset to a third party on a cash and spot basis;

(b) in compliance with this Shariah requirement the defendant has issued to the plaintiff an irrevocable Purchase Request and Undertaking to Purchase dated 9 June 2017 (see Exhibit AIB-8 page 137 of enclosure 11) where the defendant requested the plaintiff to purchase the asset and the defendant undertake to purchase the asset from the plaintiff at the Asset Sale Price (RM 1,269,360.00) upon the plaintiff's purchase of the asset from the relevant third party. Pursuant thereto, vide the Murabahah Sale Contract dated 22 June 2017 (see Exhibit AIB-4 page 2 of enclosure 11) the plaintiff agreed to sell and the defendant agreed to purchase the asset which was specifically describe in the Murabahah Sale Contract as crude palm oil at the Asset Sale Price (RM 1,269,360.00) the payment of which was to be by way of deferred payment (clause 4.1 of the Murabahah Sale Contract);

(c) the second set of the sale and purchase contract which concerned the sale of the asset by the plaintiff (appointed by the defendant vide the Agency Agreement dated 9 June 2017 as their agent to purchase and sell the asset) to a third party can be seen from the Certificates and Agency Agreement at Exhibit AIB-9 pages 139 – 151 of enclosure 11.

Cashline-i Facility

(a) the Cashline-i Facility is also based on the Shariah principle of Murabahah Tawarruq. In compliance with the Shariah requirement the defendant has issued to the plaintiff an irrevocable Purchase Request and Undertaking to Purchase dated 9 June 2017 (see Exhibit AIB-8 page 138 of enclosure 11) where the defendant requested the plaintiff to purchase the asset and the defendant undertake to purchase the asset from the plaintiff at the Asset Sale Price upon the plaintiff's purchase of the asset from the relevant third party. Pursuant thereto, vide the Murabahah Sale Contract dated 22 June

2017 (see Exhibit AIB-5 page 5 of enclosure 11) the plaintiff agreed to sell and the defendant agreed to purchase the asset which was specifically describe in the Murabahah Sale Contract as crude palm oil at the Asset Sale Price (RM 6,800,000.00) which was to be paid on a deferred basis (clause 4.1 of the Murabahah Sale Contract);

(b) the second set of the sale and purchase contract which concerned the sale of the asset by the plaintiff (appointed by the defendant vide the Agency Agreement dated 9 June 2017 as their agent to purchase and sell the asset) to a third party can be seen from the Certificates and the Agency Agreement at Exhibit AIB-10 pages 152 – 164 of enclosure 11.

BA-i Facility

(a) in respect of the BA-i Facility, the documents pertaining to the BA-i Facility which are the respective Accepted Bills-i Applications (together with Appendix 1 which indicate the applicant being the defendant, the seller/supplier of the asset which is referred to as the 'Goods' in the respective bills and the value/price of the asset), Invoice and Delivery Order addressed to and received by the defendant) and Accepted Bills-i Contract Notes (which is executed by the defendant who offered to purchase the asset from the plaintiff at the value/price stated in the Accepted Bills-i Applications) clearly describes the asset as porcelain tiles (see Exhibit AIB-6 of enclosure 11).

[24] The documents exhibited by the plaintiff shows that at all material times the defendant has full knowledge of the assets that was transacted for purpose of complying with the Shariah requirements in relation to the facilities. The assets in relation to the TF-i Facility and Cashline-i Facility, namely, crude palm oil, fulfil the requirements stipulated in the Shariah Standards And Operational Requirements issued by Bank Negara Malaysia on 28 December 2018 on Tawarruq ('BNM-Tawarruq 2018') Based on para 13 of the BNM-Tawarruq 2018, the said assets at the point of transaction were, inter alia, tangible, valuable, identifiable, deliverable, in existence and owed by the seller. Crude palm oil does not fall within the category of assets which are prohibited from being traded (see para 13.4 BNM-Tawarruq 2018).

[25] In relation to the BA-i Facility, based on para 13 of the Shariah Standards And Operational Requirements on Murabahah issued by Bank Negara Malaysia on 23 December 2013 ('BNM-Murabahah 2013') the assets traded also fulfil the requirements stipulated in BNM-Murabahah 2013. The assets, namely porcelain tiles were tangible, valuable, identifiable, deliverable, in existence and owed by the seller. Porcelain tiles does not fall within the category of assets which are prohibited from being traded (see para 13.3 of BNM-Murabahah 2013).

[26] It is pertinent to note that the defendant did not dispute that they have executed the facilities agreements and all the documents relating to the facilities in particular the respective purchase request and undertaking to purchase and the agency agreement in relation to the TF-i Facility and Cashline-i Facility and the Accepted Bills-i Applications and Accepted Bills-i Contract Notes in respect of the BA-i Facility. The defendant also did not dispute that the facilities were disbursed to them and that they had utilised the facilities to their benefit.

[27] Since the underlying assets are specifically identified in the various documents relating to the facilities and the same are Shariah compliant, there is no issue of uncertainty ('gharar') as to the underlying assets. Under the circumstances the defendant's allegations that the letter of offer, facilities agreement and the facilities are void due to a mutual mistake as to the underlying assets is flawed and untenable. It is obvious such allegations raised only after the instant action is filed against the defendant is mala fide and a desperate attempt on the part of the defendant to evade their contractual liabilities under the facilities which was granted in accordance with Shariah principles.

[28] With regard to the contentions of the defendant that the TF-i Facility and Cashline-i Facility is Syariah non-compliance because the facilities failed to comply with the policy document (BNM-Tawarruq 2018 and BNM-Murabahah 2013), I agree with the plaintiff that such contentions are bare assertions as the defendant failed to explain in what manner the facilities are Shariah non-compliant vis a vis the said policy documents.

[29] With regards to the defendant's contentions that the basis or the method of computation of the outstanding sale price and ta'widh is not explained:

(a) the plaintiff in their affidavits has set out the method to compute ta'widh (prior to maturity date/expiry of tenure of the facilities and after maturity date/expiry of tenure of the facilities) which substantially reproduced cl 15 of the letter of offer. The provision in the said cl 15 was adopted by cl 6.3 of the facilities agreement; and

(b) cl 5 of the letter of offer read with cl 12 of the same sets out the basis and computation of the outstanding asset sale price in relation to the TF-i Facility, Cashline-i Facility and BA-i Facility. In relation to the BA-i Facility, the plaintiff also issued Advices which sets out the profit rate and the profit amount in respect of each bill on the maturity date. There is no evidence to show that the defendant objected to the Advices issued.

Statement of indebtedness

[30] Pursuant to cl 18.1(a)(i) of the facilities agreement the plaintiff issued a statement of indebtedness, as in exh AIB3 of encl 9, verifying the indebtedness of the defendant under the facilities. Such statement is binding and conclusive against the defendant unless the defendant can show there is manifest error on the face of the statement (*Cempaka Finance Berhad v Ho Lai Ying (Trading as KH Trading) & Anor* [2006] 2 MLJ 685; *Tengku Azman bin Tengku Adnan & Anor v Hong Leong Bank Bhd* [2015] 2 MLJ 139). The defendant failed to provide evidence to show manifest error or that the method of calculation of the indebtedness was wrong. Thus the statement of indebtedness is conclusive evidence of the defendant's indebtedness under the facilities.

[31] The defendant has executed and without any challenge on the validity of the letter of offer and facilities agreement in relation to the facilities which was availed to the first defendant. The defendant is therefore bound by the terms and conditions of the letter of offer and the facilities agreement (*Chong Hin Trading Co Sdn Bhd & Ors vs Malayan Banking Berhad* [2004] 4 MLJ 453; [2004] 4 CLJ 436) *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686). Furthermore having benefitted from the facilities and in absence of any duress, misrepresentation or fraud it is not open to the defendant to make baseless allegations that the letter of offer and facilities agreement are Shariah non-compliant in order to evade their contractual liabilities in relation to the facilities (*Bank Muamalat Malaysia Bhd lwn Kong Sun Enterprise Sdn Bhd & Yang Lain* [2012] 10 MLJ 665; *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2011] 3 MLJ 766; [2010] 4 CLJ 388).

CONCLUSION

[32] Premised on the above, the issues raised by the defendant are not bona fide let alone triable. As such this is a fit and proper case to be disposed of summarily by way of affidavit evidence. Accordingly order in terms of prayer (a)–(i) of encl 8 and costs of RM4,000 was granted in favour of the plaintiff.

Application for summary judgment allowed with costs of RM4,000.

Reported by Izzat Fauzan